Office - Supreme Court, U. S.
FILED
OCT 31 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 645

In the Matter

of

MECCA TEMPLE OF THE ANCIENT ARABIC ORDER OF THE NOBLES OF THE MYSTIC SHRINE,

Debtor

WILLIAM DARROCK,

Creditor-Intervenor-Respondent,

MECCA TEMPLE OF THE ANCIENT ARABIC ORDER OF THE NOBLES OF THE MYSTIC SHRINE,

Debtor-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

DAVID HAAR,

Attorney for the Debtor-Petitioner.

THE COURT PRESS, N. Y. C.

INDEX.

	PAGE
Petition for Writ of Certiorari	1
Jurisdiction	3
The Issues of Law Involved	3
Statement of Facts	4
The Proceedings Before Referee Stephenson	7
The Reasons Relied On for the Allowance of the Writ	11
Brief in Support of Petition	13
POINT I—The decision sought to be reviewed appears to conflict with the spirit and intent of this Court's decision in the *United States Realty Company* case, and its subsequent decisions on the point in issue	13
POINT II—The Court below has decided an important question of Federal law which has not been, but should be, settled by this Court	21
POINT III—The ruling of the Circuit Court is novel, since it applies to fraternal organizations which have no capital even though corporate in form. For that reason this Court should grant the writ and consider and decide the question at issue	24
POINT IV—On the question of the right of the Referee *sua sponte* to initiate the proceedings for dismissal, there is conflict between the Circuit Court in the Second Circuit and the Seventh Circuit on this point of practice	25
CONCLUSION	28

TABLE OF CASES CITED:

PAGE

Case v. *Los Angeles Lumber Products Company*, 308 U. S. 106 22

Hoile, et al. v. *United Life Insurance Company*, 136 F. (2) 133 (May, 1943) 24

Marine Harbor Properties v. *Manufacturers Trust Company*, 317 U. S. 78 .....13, 16, 17

Metcalf v. *Watertown*, 128 U. S. 586 26

Northern Pacific Railway Company v. *Boyd*, 228 U. S. 482 22

Re Ettinger, 76 Fed. (2) 74 26

Securities & Exchange Commission v. *United States Realty and Improvement Company*, 310 U. S. 434, 2, 3, 4, 8, 11, 13, 14, 15, 16, 18, 19, 21, 22, 23, 26, 27, 28

Walsh, Frank E., Matter of, 256 Fed. 653 (CCA 7)..25, 26

OTHER AUTHORITIES CITED:

Bankruptcy Act:
Section 1, subd. 8 20
Section 21a 16
Section 77b 18
Section 106, subd. 12 20
Section 334 7
Section X 2, 11, 14, 16, 17, 18, 19, 21, 22, 23, 24, 25
Section XI 2, 3, 4, 11, 13, 14, 16, 18, 21, 22, 23, 27

Gerdes, "Corporate Reorganization", 52 Harv. Law Review, p. 1, at p. 5 18

H. R. 12889, 74th Congress, 2 Sess. 19
H. R. 1409, 75th Cong., 1st Sess. (1937), 41 19

Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347a), Section 240a.... 3

Supreme Court of the United States

OCTOBER TERM, 1944.

No.

In the Matter

of

MECCA TEMPLE OF THE ANCIENT ARABIC ORDER OF THE NOBLES OF THE MYSTIC SHRINE,

Debtor

WILLIAM DARROCK,

Creditor-Intervenor-Respondent,

MECCA TEMPLE OF THE ANCIENT ARABIC ORDER OF THE NOBLES OF THE MYSTIC SHRINE,

Debtor-Petitioner.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable the Chief Justice and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, Mecca Temple of the Ancient Arabic Order of the Nobles of the Mystic Shrine (hereinafter referred to as "Mecca Temple") respectfully submits this petition for a writ of certiorari, for the purpose of reviewing a decision of the United States Circuit Court of Appeals for the Second Circuit in the above entitled proceeding.

By its decision, the Circuit Court of Appeals reversed an order of the District Court for the Southern District of New York, which in turn had reversed the

order of the Referee in bankruptcy to whom the proceedings had been referred. The decision of the Circuit Court reinstated the order of the Referee, who had dismissed the proceedings of your petitioner, as a debtor, seeking an arrangement with its unsecured creditors under Chapter XI of the Bankruptcy Act. Dismissal by the Referee was predicated on his interpretation of this Court's decision in the case of *Securities & Exchange Commission* v. *United States Realty and Improvement Company*, 310 U. S. 434. Your petitioner's case turns upon the interpretation to be placed upon this Court's opinion, as expressed in the *United States Realty Company* case, *supra*, as to the circumstances under which a debtor, corporate in form only, should be required to proceed under Chapter X, rather than under Chapter XI of the Bankruptcy Act.

The Referee thought that your petitioner should not have proceeded for relief under Chapter XI, but should have proceeded under Chapter X of the Bankruptcy Act. The District Court thought otherwise, holding that your petitioner, as a fraternal organization, and under the facts disclosed, was within its rights in seeking relief under Chapter XI. The Circuit Court of Appeals, however, differed with the District Court, and agreed with the Referee, and thus affirmed the Referee's order of dismissal.

In doing so, however, the Circuit Court of Appeals admitted that on the merits, the answer to the problem posed by your petitioner's peculiar situation, is not clear-cut. The opinion speaks of "borderline cases" in which "there still is no well-defined answer to the question as to whether a particular type of corporation should be permitted to proceed under Chapter XI" (Record, p. 76).

Jurisdiction.

The order of affirmance was entered in the Circuit Court of Appeals on July 31, 1944 (Clerk's certified order). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347a).

The Issues of Law Involved.

This case presents squarely a legal problem that all of the District Courts will now be confronted with in the interpretation, and application, of this Court's decision in the case of *Securities & Exchange Commission* v. *United States Realty and Improvement Company*, 310 U. S. 434 (hereinafter referred to as the "*Realty Company*" case). The Referee in bankruptcy, the District Court which reversed his order, and the Circuit Court which reversed the District Court and affirmed the Referee, all base their decisions on the views respectively held by each of them as to what this Court intended by its decision in the *Realty Company* case.

1. Did this Court intend, by that decision, to hold that corporations, organized for fraternity or philanthropy without any profit motive, and having no capital, and no secured debts, shall be barred from seeking the benefits of an arrangement with its unsecured creditors under Chapter XI?

2. Particularly, did this Court intend, by the *Realty Company* decision, to bar a membership organization, corporate in form though it may be,

having no capital and no secured debts, from seeking such relief where the investing public has no interest in the organization, and where the debt was originally created as a result of loans by the membership only —and not one dollar was loaned by the investing public?

3. If this is a "borderline" case, as the opinion of the Circuit Court seems to indicate, was it proper for the Referee to whom the matter was referred for further proceedings under Chapter XI, to issue an order to show cause *sua sponte*, without any petition filed by anybody in interest, and then sit in judgment on his own order to show cause, and thus occupy the position of prosecutor and judge at the same time, when a decision of the Seventh Circuit Court of Appeals, on a similar point of practice, holds to the contrary, as will be pointed out in the brief submitted herewith?

These are the principal points of law which have arisen in this case, as a result of the divergent decisions, flowing directly from this Court's opinion in the *Realty Company* case.

Statement of Facts.

On July 20th, 1943, your petitioner filed a petition with the Clerk of the United States District Court for the Southern District of New York, seeking relief under Chapter XI of the Bankruptcy Act.

Your petitioner is a fraternal membership corporation organized and existing under the Laws of the State of New York (fol. 161). It is insolvent (fol. 172). It proposed an arrangement with its unsecured creditors, to-wit, to pay them 10% of the

principal amount of the bonds held by each of them. This payment was to be made during a period of ten years, at the rate of 1% per annum (fol. 163).

The schedules annexed to the petition show that it has about 1834 unsecured creditors, but no secured creditors (fol. 176). It owes over $1,200,000 of principal and interest. This money is due to these unsecured creditors because of loans made by them to Mecca Temple on March 1, 1922. The debt has been due since 1933, no interest having been paid for about ten years (fol. 178). There are no executory contracts and no liabilities on notes or bills discounted, or for accommodation paper, and, most important of all, there are no secured debts.

The assets of Mecca Temple consist of a one-quarter interest in a loft building, and a one-sixth interest in a taxpayer, both in New York City. The value is unknown, but the income for 1942 on both parcels is indicated at $1363 (fol. 182).

In addition, Mecca Temple owns cemetery plots in the Kensico Cemetery. It is impossible to state their value. One parcel had been bought in 1899, and another in 1921. Some of these plots had been used for deceased members, and it is uncertain whether the balance can be sold on liquidation (fol. 182).

There are no accounts receivable because the debtor is not in business, but Mecca Temple has membership dues that are owing from members (fol. 184). It is impossible to calculate what this amounts to because so many have been in default for a long time (fol. 185). It has money in the bank amounting to $9,597.74 (fol. 186) and has no other assets (fols. 187-189).

In its statement of affairs accompanying its schedules, your petitioner shows that it is a fraternal organization, but has no business, trade, or profession (fol. 200). It has collected from membership dues approximately $50,000 during each of the two years preceding the date of the filing of the petition, and has some miscellaneous items of receipts amounting to some $2500. It has no other source of income (fol. 201). It has some small property in trust, to-wit, hospital fund for the Shriners, which maintains a hospital for crippled children (fol. 205).

In affidavits filed under the District Court Rules, Mr. Donnatin, the recorder-secretary of Mecca Temple, states that the debtor has approximately 2800 members, who pay dues annually. The affairs of your petitioner are managed by Mr. Donnatin and a staff of employees (fols. 152, 153). Creditors of the debtor are largely bond-holders who had subscribed to bonds in 1922 for the purpose of providing funds for the construction of a building known as "Mecca Temple" (fol. 154).

The following statement is also contained in the affidavit:

> "The debtor has been in existence for over seventy-six years. A cessation of its activities would bring a hardship on all of its membership, in that, the benefits and purposes of fraternity and philanthropy among them in the organization will be completely lost" (fol. 158).

Upon the filing of the petition with the District Court, Judge Bright made an order referring the matter to Hon. Oscar W. Ehrhorn, one of the Referees in bankruptcy "to take such further pro-

ceedings therein as are required and permitted by said Act" (fol. 149). Referee Ehrhorn disqualified himself because he is a member of Mecca Temple (fol. 150). Thereupon Judge Bright made a further order dated July 23, 1943, referring the matter to Hon. Robert P. Stephenson as the Referee in bankruptcy (fol. 150).

THE PROCEEDINGS BEFORE REFEREE STEPHENSON.

Almost immediately, Referee Stephenson, instead of calling a meeting under Section 334 of the Bankruptcy Act, sent out notices to the debtor's attorney, Mr. Haar, and to the Securities and Exchange Commission, reading as follows:

> "At New York, in said District, on the 23d day of July, 1943.
>
> Upon the debtor's petition, schedules and statement of affairs, it is hereby
>
> ORDERED that the debtor and the Securities and Exchange Commission show cause before me on July 29, 1943, at 10:30 o'clock in the forenoon, at Room 201, United States Court House, Foley Square, New York City, why this proceeding under Chapter XI of the Bankruptcy Act should not be dismissed on the ground that this proceeding ought not to be allowed to proceed" (fols. 32, 33).

It will be observed that this order to show cause was not accompanied by any petition or affidavit made by anybody in interest showing the facts which might justify an order that "this proceeding ought not to be allowed to proceed".

Upon the return day of this order to show cause, Mr. Haar, the debtor's attorney, protested against

the proceeding (fol. 42). Mr. George Zolotar, the attorney for the Securities and Exchange Commission, made a statement concerning the Commission's position. He said that he was appearing without the Commission's authorization. During the past few days they had been trying to determine whether or not "there is any public vested interest in this particular debenture". They found that a small amount of over-the-counter houses had, from time to time, bought or sold these bonds or debentures. This was largely due, he thought, to the fact that "*the debentures are largely held by the members*" (fol. 49). In fact the over-the-counter houses informed them that in most instances the transactions involved *members* who wanted to dispose of the bonds, or wanted to purchase an individual bond (fol. 46).

Mr. Zolotar further stated that the public interest was "insignificant" and suggested that if Mr. Haar produced sworn testimony as to the amount which is in the hands of the members, and considering the fact that it is a fraternal benefit society, "and not an ordinary corporation organized for profit" he thought the Referee should be satisfied that the *United States Realty Company* case does not apply (fol. 47).

At an adjourned hearing on August 2d, 1943, Mr. Haar again protested that the Referee had no authority to initiate a proceeding of this kind without the Securities and Exchange Commission requesting him to do so (fol. 57). The Referee stated that he would proceed and hear the evidence. Since there was no movant other than the Referee, who might be considered such by reason of the issuance of his order to show cause of July 23, 1943, no one came forward to offer proof in support of the order to show cause.

However, the debtor's attorney offered proof of the origin and function of your petitioner. The debtor was organized in 1872 (fol. 66) as a fraternal organization, which received its charter as such from the Imperial Grand Council of the Ancient Arabic Order of the Nobles of the Mystic Shrine (fol. 66). At that time, it was an unincorporated association. In order to make it corporate in form, it complied with the Laws of the State of New York enacted in 1896. Under that statute, the Imperial Council was permitted to issue charters to such organizations as your petitioner. If already issued, then, upon the filing of a certificate of the election of trustees with the Secretary of State, it assumed its aspect of a fraternal "corporation" as distinguished from a fraternal organization, unincorporated in form. The certificate was filed on June 21, 1905 (fol. 68).

The proof shows that your petitioner's membership consists of men only. They do charity among the members (fol. 74). It has some lots in a cemetery and which are used exclusively for the benefit of the members of Mecca Temple who want to use it (fol. 75).

It is not engaged in business for profit, and neither buys, nor sells, anything. The only source of income are dues from the membership (fol. 75).

On the question of the public interest in these bonds, the record shows the following:

> "Q. Do you know whether any of the money that was borrowed back in 1922 and 1923 by Mecca Temple and for which these bonds were issued, was solicited generally from the public? A. No, sir, it was not.
>
> Q. From whom did you get the money? A. From the membership of Mecca Temple" (fol. 77).

In addition to money borrowed from the membership money was also borrowed from various Masonic lodges, who had been requested by members of Mecca Temple, and who were also members of these lodges, to subscribe (fol. 78).

They had to be Masons in order to subscribe (fol. 79). Where a woman's name appears on a list of creditors, it does so because, if a member died, his wife would have the bond and the widow would inform the Temple that she had it (fol. 80). If a woman's name is on the list from the beginning, it would be there because the member, when he subscribed, asked that the name of his wife, or daughter, be entered in the book. But the subscription came through the member (fol. 81).

All the members of Mecca Temple who subscribed to these bonds are also Masons.

> "Q. In so far as you know, no member of the general public ever subscribed for any of these bonds in 1922 or at any other time? A. No.
>
> Q. They certainly were not asked to, to your knowledge. A. No" (fol. 81).

The witness who testified to these facts was Ruth E. O'Brien who had been connected with Mecca Temple for about twenty-five years.

Mecca Temple has been in existence since September 26th, 1872, and its functions are performed under a charter granted at that time by the Imperial Council (fol. 84).

The members do not all live in New York City or its vicinity, but they are scattered all over. In fact some members live in California (fols. 97, 98).

These are the only facts about which any testimony was given before the Referee pursuant to his order to show cause dated July 23d, 1943.

The Reasons Relied On for the Allowance of the Writ.

1. The Court below has decided a federal question, to-wit, a question arising under the Bankruptcy Act, in a way that seems to conflict with the intent of this Court's decision in the *United States Realty Company* case, and its subsequent decisions bearing specifically on the point in issue.

2. The Court below has decided an important question of federal law, which has not been, but should be settled by this Court, to-wit, whether a fraternal organization, having no capital, not organized for profit, having only unsecured creditors, must apply for reorganization under Chapter X, and is barred from seeking the benefits of an arrangement under Chapter XI of the Bankruptcy Act.

3. The ruling of the Circuit Court of Appeals is novel in its application to fraternal organizations who seek the benefits of Chapter XI, because they have no secured creditors and the general public is not concerned with its affairs.

4. The Court below decided that the Referee in bankruptcy had the power *sua sponte* to issue the order to show cause and make the order of dismissal. This appears to be in conflict with a decision of the Circuit Court of Appeals for the Seventh Circuit,

which, on a similar question of practice, ruled otherwise.

WHEREFORE, your petitioner respectfully prays that this petition for a writ of certiorari to the United States Circuit Court of Appeals should be granted.

MECCA TEMPLE OF THE ANCIENT
ARABIC ORDER OF THE NOBLES OF
THE MYSTIC SHRINE,
By LOUIS B. DONNATIN,
Recorder,
Petitioner.